IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5495 OF 1988.

Rasiklal Kumbha Gala,]
doing business at Tashkand Building,]
Shop No.1, Borivli (West), Mumbai - 92]
by his Constituted Attorney] .. Petitioner
Ashidhir Kumbha Gala.] (Orig. Respdt.)

Versus

Manilal Ravji, adult,]
residing at 46-P, Ground floor,]
Block No.1, C.S.T. Road, Chembur,] .. Respondent
Bombay - 400 071.] (Ori. Applt.)

Mr. R.A. Thorat with Vaibhav Sugdare for the petitioner.

Mr. M.V. Pandeye for the respondent.

CORAM: ANOOP V. MOHTA, J.

DATED: 10TH AUGUST, 2005

ORAL JUDGMENT. :

1. Petitioner - original respondent has invoked Article 227 of the Constitution of India and sought to challenge the judgment and order passed by the Additional Chief Judge, Small Causes Court, Bombay, dated 6th October, 1988, whereby, the Ejectment Application filed by the respondent-original applicant allowed and the petitioner-respondent has been directed

to vacate the premises from Shop No.1, Tashkand Building, Borivali (West), Bombay - 400 092. Therefore, the present Writ Petition.

2. Based on a Conducting Agreement, dated 19th May, 1972, petitioner was allowed to run a grocery business on the terms and conditions as incorporated in the said agreement. The respondent preferred the said Ejectment Application No. 12/53/E/1976 in the Trial Court sometime in the year 1976,. The application is dated 31st January, 1976, but there is an endorsement of date 12th August, 1976 also. Paragraphs 6 and 7 of the said application, as relevant, are reproduced herein below:

> "6. The Applicant submits that incidental to the conducting to the business, the Respondent was permitted to use the said shop premises for the said period that has been fixed and the said period has expired. Therefore the Respondent has become liable to return the said running business along with the said shop premises to the Applicant.
>
> 7. The Applicant further submits that the said agreement is for conducting and managing the said business, therefore, Amended Rent Act does not apply to the premises. Moreover, the Respondent is not protected under the said Amended Rent Act."
>
> [emphasis added]

In reply to the said averments, the petitioner-original

respondent in his Points of Defence replied as under:

> "4. The Respondent denies all the allegations of the Applicant made by the Applicant in para 7 of the Application and submits that he is protected under the amended Bombay Rent Control Act. The Respondent says that there was no agreement or any other similar document subsisting between him and the Applicant at the time of filing the above Application."

3. The above averments itself are sufficient to consider such Ejectment proceedings before the Small Causes Court at Bombay in view of Section 41 of the Presidency Small Causes Court Act, 1882 (for short "PSCC Act"). These averments further make it clear that the parties have also referred to the provisions of the Bombay Rents, Hotel Lodging House Rates Control Act, 1947 (for short "The Bombay Rent Act") and raised the disputed issue about the protection, as available under the said Bombay Rent Act. The Trial Court, after considering the rival contentions framed the following Issue:

> "Issue No.5: Does the respondent prove that he is protected under the provisions of Section 15-A of the Bombay Rent Act in respect of the suit premises."

Therefore, the parties, based on the pleadings, invoked the provisions of the Bombay Rent Act. Having once invoked the provisions of the Bombay Rent Act and the protection as contemplated under the Bombay Rent Act has been prayed for, there remains no doubt that the Small Causes Court has jurisdiction to consider and deal with such application for Ejectment even though the basic possession of the premises has a foundation of a Conducting Agreement, as contemplated. In view of the above and in the facts and circumstances of the case, therefore, the preliminary objection as raised by the petitioners counsel and opposed by the counsel appearing for the respondent, is rejected.

4. The learned counsel appearing for the petitioner relied on an unreported judgment in Civil Revision Application No.132 of 1981 [Pendse, J.] dated 6th August, 1982, and sought to contend that if the eviction proceeding is initiated for possession of the premises based on such Conducting Agreement, the Small Causes Court under Section 41 of the PSCC Act, has no jurisdiction. He further relied on **Smt. Anusayabai Narayanrao Ghate Vs. Smt. Maktumbi S. Nadaf** 1999 (2) Bom.C.R., 374 for the. In both the above cases, there was no case of above or such pleading about the Bombay Rent Act. No issue of Section 15-A was raised in the

said cases. Therefore, on this fact itself, those cases are distinguishable.

5. The Appellate Court, after considering the rival contentions raised by the parties, based on the objection as raised, and after considering the provisions of Section 15-A of the Bombay Rent Act, reversed the judgment and order passed by the learned Trial Court dated 14th November, 1983, and allowed the Ejectment Application. Even assuming for a moment that without a necessary pleading and/or specific submissions, the learned Trial Court had framed the issue as referred above, still in view of the positive statement made in the pleading by the respondent and the same being specifically answered in reference to the protection available under the Bombay Rent Act, there remains no doubt that the Court has jurisdiction to consider those issues and having once taken note of the same, the Court, after considering the rival contentions, is correct in granting the order of eviction. In the present case, as observed by the Appellate Court, the case has been made out by the respondent and the terms and conditions of the agreement itself shows that it was for a conducting business.

6. Under the Bombay Rent Act, the definition of

the word "licensee" specifically excludes the "conducting business". This exclusion, if taken note of, whatever may be the reason for occupying the premises in question, but if it is based on the foundation of conducting business, I am of the view that the occupant or such person is not entitled for the protection as available under the Bombay Rent Act, either as a licensee or sub-tenant. The exclusion of the word "conducting business" makes the provision amply clear.

7. The long and exclusive possession is the basic foundation to claim the protection of lease or licence. But if the possession of the premises has a foundation of the conducting business, it is difficult to accept that in each and every case, the intention was to create licence or lease. The agreement, as referred above, made the conditions very clear which were well within the knowledge of the parties. The parties, having once accepted these terms and conditions, cannot turn around to say later on that the intention was to create lease.

8. One facet which is also important to be noted is that in the present case, the agreement was entered into for the first time in May, 1972. Knowing fully well, the effect and operation of the law, including the

definition of "licensee", still if a party agrees to enter into such agreement to conduct business, there remains further no doubt that the intention was always to carry on business on the basis of such Conducting Agreement and there was no intention to create a lease or licence.

9. The Bombay High Court in the following cases made it amply clear, while interpreting the provisions of Bombay Rent Act, in such cases of Conducting Agreement of business, as under. In **Ratanlal Gulabji Bhati Vs. Himmatlal Hukumji Parihar** 24, Bom.R.C., 1987, it was observed as under:

> "In that case, admittedly there was a running business given to the defendant for conducting. In the present case, more or less, noticeably what was given to the defendant was a business for conducting. No doubt he was inducted in to the possession of the suit premises, but that was because there was a business running in the suit premises and the defendant was to conduct that business."
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> "The premises may be governed by Section 6 of the Rent Act, but the plea that therefore defendant is entitled to protection of Rent Act is a misconceived plea and has got to be rejected."

In **Abhay Divekar & Ors. Vs. Dr. Nalini Kantilal Parekh & Ors.** 1988, Bom.R.C., 274, it was observed as

under:

> "Section 5(4A) defines "licensee" in respect of any premises to be a person in occupation of the premises under a subsisting agreement for license. But, his very definition carves out an exception. The "licensee" does not include, *inter alia*, "a person conducting a running business belonging to trhe licensor". The premises were not given to Parekhs. They conducted the hospital belonging to Dr. Divekar."

In **Mrs. Fatimabai Noor Mohamed Vs. M. Khalil Ahmed and another** 1990, Bom.R.C., 366, the Court observed as follows:

> "The aforesaid provisions of Section 5(4-A) of the said Act of 1947 make it abundantly clear that the permission given for conducting the said beedi business in the suit premises does not fall within the definition of the word 'licence' and, therefore, there is no question of protection of the present respodent under the Bombay Rent Act."

10. The agreement itself refers to the words "owner" and "conductor". This aspect, read with the clauses as referred herein below, further justify the case of the respondent that the intention was to allow the premises for conducting the business.

11. There is no clause which creates any kind of

interest in the property. The deposit of Rs.5,000/-, in the circumstances itself, cannot be the foundation to accept the said agreement as a lease or licence agreement. In this background, the Appellate Court was right in observing in paragraph 13 that the learned Trial Judge was wrong in observing that the agreement was subsisting and, therefore, there was no termination as contemplated under the Act. Such agreements, if taken note of, has a limited period. In the present case, the agreement expired on 31st March, 1973.

12. After considering the above clauses and the terms and conditions of the agreement in question, I am not convinced that any case of lease or licence has been made out for protection as sought under the Act. The case of sickness, the reason for handing over such business and the disability of the person to hand over such business cannot be a ground as rightly observed by the Appellate Court.

13. The Appellate Court further is right in granting and allowing the Ejectment Application by observing that there is no dispute in respect of giving the business for conducting under Exhibit-B as it remained uncontroverted and unchallenged. Therefore, based on the said agreement and the averments made, I

see there is no case made out to interfere with the findings given by the Appellate Court.

14. By an order dated 23rd July, 2002, after hearing respondents only, by reasoned order, Writ Petition was dismissed by observing as follows:

> "It appears from the order of the Trial Court that the Trial Court has recorded a clear finding that the respondent had given the business to the petitioner for conducting. In the face of this finding therefore, an application under section 41 of the Presidency Small Causes Court Act was maintainable. The appellate Court has also observed in paragraph 13 of its order that once a finding is recorded that licence was granted by the respondent to the petitioner for conducting the business and once an application for ejectment has been made, the only course open to the Trial Court was to make an order of ejectment. I find that the order that has been made by the Appellate Court is an order made in accordance with law and no exception can be taken to that order."

15. The Writ Petition is, therefore, dismissed. Rule is discharged. Stay granted, also stands vacated. However, at the request of the petitioner, the effect and operation of this judgment and order is stayed for a period of 8 weeks, on a condition that the petitioner should not create any third party interest. The petitioner shall clear the arrears of rent, if any, within a period of two weeks.

. Issuance of certified copy expedited.

[ANOOP V. MOHTA, J.]

[srpasha@hc]